86-503

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether under the Norris-LaGuardia Act a district court has jurisdiction to enjoin coercive picketing of a railroad employer by a railroad union when the picketed employer has no labor dispute with the union and is a neutral in the dispute between the picketing union and the primary employer.

2. Whether the Norris-LaGuardia Act should be interpreted to accommodate Congressional policies expressed in the Railway Labor Act and the Interstate Commerce Act so as to prevent the disruption of rail service by a railroad union's picketing of a railroad which is neutral in the dispute between the union and the primary railroad employer.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Richmond, Fredericksburg & Potomac Railroad Company[1] and the Respondent, Brotherhood of Maintenance of Way Employes.

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[1] *Rule 28.1 Listing.* Richmond, Fredericksburg & Potomac Railroad Company is controlled by CSX Corporation through its ownership of the Cheasapeake & Ohio Railroad, the Baltimore & Ohio Railroad, and Seaboard Railroads which together control Richmond-Washington Company which in turn owns 60% of the voting stock in RF&P.

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BROTHERHOOD OF MAINTENANCE OF WAY
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Richmond, Fredericksburg & Potomac Railroad Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on July 11, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 795 F.2d 1161 and is reprinted in Appendix A, hereto, 1a-17a. The opinion of the Honorable H. Emory Widener, Jr. sitting as a single

judge is reprinted in Appendix B, at 18a-22a. The orders of the United States District Court for the Eastern District of Virgini which gave rise to this proceeding are reprinted in Appendix C at pages 23a-25a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1337 and seeking to enforce certain rights and obligations arising under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* the petitioner brought this suit in the Eastern District of Virginia, Alexandria Division. On April 4 and April 10, 1986 petitioner sought and was denied preliminary injunctions to prevent picketing of its two railyards by the Brotherhood of Maintenance of Way Employes. A notice of appeal to the Fourth Circuit from both orders was filed on April 11, 1986 pursuant to 28 U.S.C. § 1292(a)(1). On July 11, 1986 the Fourth Circuit entered a judgment affirming the District Court's orders. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked pursuant to 28 U.S.C § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of certain sections of the Railway Labor Act ("RLA") 45 U.S.C. § 152 *et seq.*, certain sections of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113, and certain provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10101(a). These provisions must be interpreted in light of two other statutes: § 8(b)(4) of the National Labor Relations Act ("NLRA"), 29

U.S.C. § 158(b)(4), and § 20 of the Clayton Anti-Trust Act, 15 U.S.C. § 17. All of these provisions are set forth in Appendix D.

STATEMENT OF THE CASE

A. Procedural History.

This appeal is taken from the affirmance by the United States Court of Appeals for the Fourth Circuit of the denial of two applications for temporary restraining orders and preliminary injunctions made by Richmond, Fredericksburg & Potomac Railroad Company ("RF&P") in the United States District Court for the Eastern District of Virginia to enjoin the picketing by the Brotherhood of Maintenance of Way Employes ("BMWE"), their members, employees, agents and others at RF&P's facilities in Alexandria and Richmond, Virginia which had resulted in the refusal of many RF&P employees to report to work.

The two applications for preliminary injunctions were denied by District Judge Albert V. Bryan, Jr. on April 4 and 10, 1986, respectively, on the ground that the District Court lacked jurisdiction under the Norris-LaGuardia Act, relying on an overly—broad interpretation of this Court's decision in *Jacksonville Bulk Terminals, Inc. v. International Longshoremans Ass'n*, 457 U.S. 702 (1982).

On April 11, 1986, RF&P filed a Motion for Injunction Pending Appeal pursuant to FED.R.APP.P. 8. Since the Court of Appeals was in recess, RF&P was granted a hearing before a single circuit judge, the Honorable H. Emory Widener, Jr., who heard the matter in chambers in Abingdon, Virginia on April 12, 1986. At that time Judge Widener issued an order

granting the injunction sought by RF&P. Argument on the merits of the appeal was heard before a three-judge panel of the Court of Appeals on May 5, 1986.

Subsequent to that hearing, and on that date, by a vote of two to one, Judge Widener dissenting, the panel dissolved the injunction pending appeal which Judge Widener had entered on April 12. On July 11, 1986, the panel issued its decision affirming the District Court; again, in a two to one vote, Judge Widener having dissented.

B. Statement of Facts.

BMWE is involved in a primary labor dispute with the Maine Central Railroad Company ("MEC") and its subsidiary, The Portland Terminal Company ("PT"). The MEC and PT, together with the Delaware & Hudson Railway ("D&H") and the Boston & Maine Corporation ("B&M"), are part of the Guilford Rail System, of which Guilford Transportation Industries, Inc. is the parent corporation.

The primary strike by the BMWE against MEC/PT commenced on March 3, 1986 after the parties had exhausted all of the procedures required by the Railway Labor Act. Thereafter BMWE extended its picketing activities to the B&M and then to the D&H.

On April 2, 1986, MEC and PT broke off negotiations with the BMWE. The National Mediation Board, operating under the authority of the RLA, then recessed its public interest mediation efforts without setting a future date for negotiations.

RF&P has no corporate ties with any of the railroads included within the Guilford Rail System. The District Court explicitly found that RF&P was a

"neutral"[2] in the primary labor dispute between BMWE and the struck railroad. (App. C at 23a and 24a). Indeed, the District Court specifically found that the picketing of the RF&P by BMWE would have no effect on the parties engaged in the primary labor dispute between BMWE and MEC and PT. (App. C at 24a).

The BMWE targeted two railyards operated by RF&P. The first was Potomac Yard in Alexandria, Virginia. The second yard was Acca Yard in Richmond, Virginia. MEC, PT, and B&M do not operate south of New England. D&H does not operate south of Alexandria. RF&P is a major "bridge" carrier which connects the northeastern and southeastern United States by rail between Potomac Yard and Acca Yard.

Picketing At Potomac Yard

Potomac Yard is a freight classification yard. In addition to handling RF&P's own traffic, Potomac Yard performs interchange services for the traffic of five other tenant railroads, including the D&H. Under § 1 of the ICA, 49 U.S.C. § 10101(a)(1978), the RF&P is obligated to service all rail traffic connecting with its Potomac Yard.

Potomac Yard is not the home terminal of any D&H employees and no D&H personnel are employed there. No D&H employee is responsible for the day-to-day operations of Potomac Yard. Potomac Yard is operated solely by RF&P employees.

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[2] The term "neutral" in the labor context has recently been defined as "a third party wholly unconcerned in a dispute between other parties." *Production Workers Local 707 v. NLRB*, ___ F.2d ___, 122 LRRM 2877 (D.C. Cir. 1986).

Only six percent of the freight interchange at the yard is D&H traffic. This percentage did not increase after the BMWE dispute commenced. Potomac Yard performs no repairs on locomotives or freight cars used by tenant lines other than "running repairs" which are required by the safety regulations of the Federal Railroad Administration and by the interchange rules of the Association of American Railroads. The costs are billed directly to the owners of the equipment.

When BMWE posted pickets at Potomac Yard on April 4, 1986 the picketing had an immediate and serious impact on the operations of the tenant railroads (exclusive of D&H) connecting there including Consolidated Rail Corporation ("Conrail"); Baltimore & Ohio Railroad Company; Southern Railway; Chesapeake & Ohio Railway Company; and RF&P, all of which are neutral in the dispute between MEC and BMWE. Further, the picketing seriously impaired the ability of the neutral RF&P to perform its required services to the other four neutral railroads operating into the Yard.

Picketing At Acca Yard

On April 9, 1986 BMWE placed pickets at the headquarters facilities of RF&P in Richmond, Virginia and at the Acca Yard. Few of RF&P's employees represented by various unions including BMWE reported to work while the picketing was in progress. Such activity was in concert with other actions taken by BMWE in placing and threatening to place pickets at operating facilities of other neutral railroads in various locations including Chicago, Buffalo, Cleveland, Bellevue, Ohio and Los Angeles.

Acca Yard is owned and operated solely by the RF&P in its own interest and in the interest of the Seaboard System Railroad and is even more remote from the primary labor dispute between MEC and BMWE than is Potomac Yard. None of the railroads that utilize the interchange service of Potomac Yard (including the D&H) has any facilities, access to or engages in any activity at any of the Richmond facilities and none of their employees performs any service at or enters upon the premises.

Post-Decision Picketing

Following the dissolution of the injunction prohibiting the picketing on May 5, 1986 the BMWE again posted pickets at the Alexandria and Richmond facilities. As a result, all but a few of RF&P's union employees refused to cross the picket lines, resulting in a severe disruption of RF&P's ability to service north-south traffic along the eastern seaboard. The picket lines were established specifically to prevent RF&P's employees from reporting to work.

As a result of the work stoppage, RF&P was unable fully to meet its obligations to provide "safe and adequate" transportation service "on a reasonable request" as required by the ICA. RF&P's ability to meet its obligations became more difficult as the coercive picketing continued, resulting in a loss of some business which can never be regained. The total amount of the damages cannot be precisely ascertained, but RF&P estimates that the picketing if it had continued could have resulted in daily revenue losses to RF&P in excess of $117,000. RF&P averages revenues of approximately $250 per car for its 108-mile haul between Potomac Yard and Richmond.

The picketing of RF&P also caused irreparable economic injury not only to its employees but also to the other employees dependent upon the railroad's continued operation. The wage loss suffered by RF&P employees alone amounted to $1.6 million per month.

As a result of the picketing undertaken by BMWE across the nation against Conrail, Burlington Northern Railroad Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Aitcheson, Topeka and Sante Fe Railway Company, Baltimore & Ohio Railroad Company, Baltimore & Ohio Chicago Terminal Company, Chesapeake & Ohio Railway Company, Norfolk Southern Corporation and RF&P, the President issued Executive Order 12557 on May 16, 1986 calling for the establishment of an Emergency Board pursuant to 45 U.S.C. § 160. As a result of the creation of the Emergency Board, BMWE and MEC/PT were required to return to the status quo prior to the strike. The Board issued its report on June 20, 1986. The Board's recommendations have not been adopted by MEC, PT and the BMWE and thus the principals of the primary dispute have not reached agreement.

On August 12, 1986 the House of Representatives adopted H.J.Res. 683 creating a Congressional Advisory Board. The President signed the bill on August 21, 1986 and it is now Public Law 99-385. On September 8, 1986 that Board recommended that the parties accept the findings of the Presidential Emergency Board. Further, the panel advised that if the parties did not agree to those terms Congress should enact legislation requiring them to do so. Whether such legislation, even if adopted, would pass constitutional muster is in serious doubt. In short, the

BMWE will be free to resume the picketing at any time after September 19, 1986.

C. The Decision of The Court of Appeals.

In its two to one decision, the Court of Appeals ruled that a federal court had no jurisdiction to issue an injunction to prevent secondary picketing in the rail industry. The basis for this conclusion was the prohibitory language of the Norris-LaGuardia Act, 29 U.S.C. § 104 and the definitions of a labor dispute contained in § 113 of that Act. RF&P argued below that Norris-LaGuardia must be accommodated with other legislation affecting the rail industry including the RLA and the ICA. The panel majority rejected those contentions, ruling that this Court's decision in *Jacksonville Bulk Terminals, Inc. v. International Longshoreman's Ass'n*, 457 U.S. 702 (1982) required a literal reading of Norris-LaGuardia even in disputes governed by the RLA. Further, despite the fact that *Jacksonville Bulk* specifically noted that Norris-LaGuardia must be accommodated to "specific federal legislation or paramount Congressional policy", the lower court held that there would be no accommodation of Norris-LaGuardia to the RLA or ICA.

Finally, in direct opposition to decisions of the Fifth and Eighth Circuit Courts of Appeals in *Ashley, Drew & Northern Railway v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980) and *Brotherhood of Railway Trainmen v. Atlantic Coast Line Co.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), the Court held that the "substantial alignment" doctrine which requires a showing of assistance to the struck railroads by the RF&P before Norris-LaGuardia applies, would not be adopted by the Fourth Circuit.

Judge Widener in his dissenting opinion noted that in *Jacksonville Bulk* this Court was concerned only with the reach of Norris-LaGuardia as it relates to "what was obviously and in fact a labor dispute but which was based on political motives." As Judge Widener further noted the case did not rule on Norris-LaGuardia's applicability in the secondary picketing context or, in his words, "absent a labor dispute". Finally, Judge Widener correctly pointed out that this Court did not rule on accommodation of Norris-LaGuardia to the RLA or the ICA in *Jacksonville Bulk*.

REASONS FOR GRANTING THE WRIT

I. AN INTERCIRCUIT CONFLICT EXISTS WHICH MUST BE RESOLVED BY THIS COURT

The split decision of the panel below and those of several other circuits are unprecedented in labor law jurisprudence and particularly in the transportation industry. For literally generations the railroad industry has been governed by a *sui generis* labor law, culminating in 1932 with the RLA. BMWE's position, that since the RLA is silent on secondary picketing it may shut down the nation's rail system, has not been the law in this country for nearly 100 years.[3]

Facing the precise issue presented by this appeal, the courts have for twenty years (until this latest incidence of picketing activity) held secondary picketing of neutral railroads unlawful and enjoinable de-

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[3] *See, e.g., Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893); *Thomas v. Cincinnati N. O. & T. P. Ry. Co.*, 62 Fed. 803 (S.D. Ohio 1894); *Southern Ca. Ry. Co. v. Rutherford*, 62 F. 796 (S.D. Cal. 1894).

spite the prohibitions of the Norris-LaGuardia Act. It is only when a railroad has substantially aligned itself with the primary employer that a union may extend its picketing to the secondary railroad. That test has been adopted in at least two circuits—the Fifth and Eighth.

Thus, and as acknowledged by the respondents in their Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit Before Judgment, No. 85-1792, there exists a split affecting at least six circuits on the specific issue as to whether the substantial alignment doctrine applies in the rail industry context and whether injunctions may issue to enjoin secondary picketing of a neutral rail industry employer.[4]

It cannot be disputed that the issues presented by this controversy are of national importance. Railroads across the United States have been threatened by

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[4] In addition to the decision of the Fourth Circuit, the District of Columbia, Second and Seventh Circuits have ruled that federal courts lack the power to enjoin the BMWE from engaging in secondary picketing. *Central Vermont Ry. v. BMWE*, No. 86-5245 (D.C. Cir. June 27, 1986); *Consolidated Rail Corp. v. BMWE*, No. 86-7289 (2nd Cir. June 5, 1986); *Burlington Northern Railroad Co. v. BMWE*, No. 86-1666 (7th Cir. June 4, 1986). The Fourth, Seventh and District of Columbia Circuits have explicitly acknowledged that their opinions conflict with the decisions of the Fifth and Eighth Circuits. *Ashley, Drew and Northern Railway v. United Transportation Union, Brotherhood of Railway and Steamship Clerks v. Atlantic Coast Line Railroad.* In addition to the RF&P, Burlington Northern Railroad Company and others have filed a Petition for Writ of Certiorari to the Seventh Circuit in this Court, No. 86-39, as have Norfolk and Western Railway Company and others to the Fourth Circuit, No. 86-175.

BMWE's position that it is entitled to picket any railroad in the United States so long as it has a local dispute somewhere. Injunctions arising out of these picketing incidents were sought in the First, Second, Fourth, Seventh and the District of Columbia Circuits. At least 13 railroads not involved in the primary dispute have been seriously affected by the picketing. This issue of vital national importance should be decided by this Court particularly in view of the split that reaches at least six circuits. *See* Rule 17.1(a) of the Rules of this Court.

II. THE NORRIS-LAGUARDIA ACT DOES NOT BAR AN INJUNCTION ON THE FACTS OF THIS CASE

The Court of Appeals held that Norris-LaGuardia divests the federal courts of jurisdiction to issue an injunction "in any case involving or growing out of any labor dispute". *See* 49 U.S.C. §101. The panel majority relied on the Act's definition of a "labor dispute" which provides that a case is deemed to involve or grow out of a dispute "when the case involves persons who are engaged in the same industry, trade, craft or occupation. . . ." 49 U.S.C. § 113(c). The majority, like the District Court, applied the statute in its most literal sense in direct conflict with the decisions of two other circuits.

The situation which confronts the Court on these facts has been considered by judicial tribunals ever since unions developed the technique of intertwining neutrals in disputes the unions have with other employers. *See* footnote 3, *infra* at 10a. In the private, non-transportation sector, the Labor-Management Relations Act, 29 U.S.C. § 141 *et seq.* (1947), incorporates an elaborate scheme which provides protection to picketed "secondary employers" unless they be-

come involved in the dispute by becoming an "ally" with the employer engaged in the primary dispute. *See, e.g., Kable Printing Co. v. NLRB*, 545 F.2d 1079 (7th Cir. 1976).

A similar doctrine has developed in the rail industry and is known commonly as "substantial alignment." The purpose of the test is to determine whether a "labor dispute" exists between the union and the *picketed* secondary employer. At the heart of the inquiry is whether the union's picketing will further the union's economic interest in the primary dispute. *Ashley, Drew*, 625 F.2d at 1363. In applying the test the court must determine whether the particular labor activity involving the *secondary* party will have an impact upon the employer engaged in the primary labor dispute. The court generally will find an impact on the primary employer if the picketed company is providing substantial assistance to the primary employer engaged in the primary labor controversy. If no impact is discernible, then there is no "labor dispute" between the union and the secondary party and Norris-LaGuardia does not apply.

The theory of substantial alignment was first applied in *Brotherhood of Railway Trainmen v. Atlantic Coast Line Co.*, 362 F.2d 649 (1966). The Fifth Circuit denied the railroad an injunction finding that the union had an economic interest in picketing the secondary railroad since that railroad had "substantially aligned" itself with the primary employer.

There, Jacksonville Terminal performed daily services for Florida East Coast Railway. The terminal was jointly owned by the struck primary employer, Atlantic Coast Line, and Florida East Coast. As a result of the interaction of the two railroads the court

held that Florida East Coast was "substantially aligned" with Atlantic Coast Line. Thus, Florida East Coast was involved in the primary labor dispute and an injunction against the picketing at the Jacksonville Terminal was denied on the basis of Norris-LaGuardia.

While the injunction was denied, the substantial alignment doctrine was utilized to determine whether a "labor dispute" *existed*, as that term is used in Norris-LaGuardia. In a strong dissenting opinion, Judge Choate related the legislative and judicial history of the Norris-LaGuardia Act and the issuance of injunctions thereunder in transportation industry disputes. Interestingly, *Atlantic Coast Line* was affirmed by an equally divided Court at 385 U.S. 20 (1966), thereby suggesting support for Judge Choate's dissent.[5]

In *Consolidated Rail Corp. v. BRAC*, 99 LRRM 2608 (W.D.N.Y. 1978), the District Court for the Western District of New York was confronted with

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[5] Three years later this Court decided *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). There the primary holding of this Court was that federal, not state, law applied. In that case, however, the union picketed a passenger and freight terminal in Jacksonville, Florida. The terminal was found to be "an integral part of the day-to-day operations" of one of the owners of the terminal, *i.e.*, Florida East Coast Railway.

Certainly then, *Jacksonville Terminal* does not stand for the principle that Norris-LaGuardia prevents the issuance of an injunction when a neutral secondary employer is picketed. Rather, it means only that when the secondary employer is integrally involved in the same operation with the primary employer no injunction will issue. Such is not inconsistent with but rather supports the substantial alignment doctrine.

a situation involving secondary railroad employers. There, too the Court applied the "substantial alignment" concept and held:

> Because I find no substantial alliance between Conrail and N&W, I conclude that there is no labor dispute involving Conrail and BRAC that would deprive this Court of jurisdiction to issue an injunction.

99 LRRM at 2611.

Ashley, Drew & Northern Railway v. United Transportation Union, 625 F.2d 1357 (8th Cir. 1980), presented a situation similar to the case presented here. There, the primary dispute existed between the Rock Island Railroad and the United Transportation Union. Eventually the picketing was extended to Ashley, Drew. The union argued that since Ashley, Drew used its supervisors to move freight of an affiliated railroad over the struck railroad's line, Ashley, Drew had aligned itself with the struck primary employer, the Rock Island. The Court found no "alignment" and held that there was no "labor dispute". It applied the following test:

> When a non-struck employer seeks to have the union's activities enjoined by a federal court the case involves or grows out of a labor dispute - and thus the Norris-LaGuardia anti-injunction provisions apply - only when the offending activity is furthering the union's economic interest in a labor dispute.

625 F.2d at 1363.

In reaching this conclusion the Eighth Circuit cited more than a dozen cases which found "no labor dis-

pute" to exist under Norris-LaGuardia when there was no substantial alignment between the struck primary employer and the picketed "neutral" employer. 625 F.2d at 1363-64.

The court reconciled its decision with the proscription of Norris-LaGuardia as follows:

> Although the plain language of the statute is often controlling, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose.

625 F.2d at 1365.

The Court reasoned that Norris-LaGuardia was meant to "*preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis*" and "was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interest in a labor dispute ceased". 625 F.2d at 1366.(emphasis added)

Similarly, in *Western Maryland RR Co. v. System Board*, 465 F. Supp. 963 (D. Md. 1979), the district court had before it a situation much like the factual situation confronting RF&P. There the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC") picketed rail facilities at Brunswick and Cumberland, Maryland, which were owned by Western Maryland Railroad and the B&O. BRAC's dispute was not with either of these railways but was with Norfolk & Western Railway Company ("N&W"). Western Maryland provided no service to N&W at either of those sites, just as RF&P provides no service to MEC or PT at Alexandria or Richmond. Similarly, N&W had neither

an interest in nor was it a tenant of the Cumberland and Brunswick facilities, just as MEC is not a tenant at either the Alexandria or Richmond yards of RF&P. Judge Young granted the injunction and enjoined the picketing at the Brunswick and Cumberland facilities, holding:

> Where a particular labor activity has no economic impact on an employer engaged in a labor dispute, the activity can have no effect on the outcome of the dispute, and for that reason, it is not protected under Norris-LaGuardia as growing out of that dispute.
> . . .
>
> In picketing the N&W and other railroads servicing N&W freight traffic, the defendant union seeks to coerce the railroad into accepting its demands, by effecting a shutdown of the employer's operation. This has been the way labor has traditionally gone about promoting its interest. However, since the activities of the plaintiff railroads in Cumberland and Brunswick do not involve the servicing of N&W freight traffic, the court must conclude that the picketing at these facilities furthers no economic interest of BRAC in the underlying labor dispute. Accordingly, the court finds that BRAC's picketing at the Cumberland and Brunswick facilities of the plaintiff railroads does not "grow out of a labor dispute" and is therefore enjoinable consistent with Norris-LaGuardia.

465 F. Supp. at 973.

The rule applied by Judge Young in *Western Maryland* and by the Fifth and Eighth Circuits was the prevailing law until this most recent flurry of picketing by the BMWE and the ensuing decisions from the various Courts of Appeals.

The Fourth Circuit here, relied upon this Court's decision in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982), in applying a literal interpretation of Norris-LaGuardia. There, a longshoremen's union, reacting to the Soviet Union's intervention in Afganistan, refused to load certain goods on ships bound for the Soviet Union. The employer then brought suit pursuant to the NLRA, 29 U.S.C. §185(a), alleging that the union's work stoppage violated the terms of the collective bargaining agreement because the activity was politically motivated and did not concern relations with its primary employer. This Court held that the motivation *of the strike* was not a concern under Norris-LaGuardia and ruled that the statute barred issuance of an injunction.

A rational analysis of *Jacksonville Bulk*, however, shows that it is inapplicable to the issues now before the Court. That case involved a *primary* dispute between two *non-railroad* industry parties and thus the RLA was not the governing statute. The case at bar involves a neutral railroad, not involved in a primary dispute. *Jacksonville Bulk* simply addressed the question of whether a politically motivated refusal to work was an arbitrable labor dispute and thus was enjoinable. It did not involve the RLA, the ICA, or a union's right to picket a neutral employer not involved in a railroad dispute.

In essence, the doctrine of substantial alignment deals with the issue of whether a dispute *exists* between the two affected parties at all. *Jacksonville Bulk*, on the other hand, dealt only with the *motivation* underlying the dispute in a non-railroad controversy. This is a critical difference that was not acknowledged by the Court of Appeals.

Further, even in *Jacksonville Bulk* this Court expressly noted that Norris-LaGuardia's broad prohibitions will not apply "in narrowly defined situations where necessary to accommodate the Act to specific federal legislation or paramount Congressional policy". 457 U.S. at 708.

Specific federal legislation and paramount Congressional policy exist here and are embodied in the RLA and the ICA as discussed below. It is beyond dispute that the RLA was adopted specifically to promote labor peace, not conflict, and the decisions of the various courts of appeals arising out of the present picketing by BMWE does more to enhance labor conflict than any single decision in the area of railway labor relations ever to have been issued by a court.

III. THE RAILWAY LABOR ACT AND THE INTERSTATE COMMERCE ACT PROVIDE A BASIS UPON WHICH THE COURT COULD ISSUE AN INJUNCTION

If this Court were to find that Norris-LaGuardia does apply to a secondary railroad boycott even absent substantial alignment, then an injunction could still issue because the policies of Norris-LaGuardia must be accommodated to those contained in the RLA and ICA. The Court of Appeals, relying in part upon the Seventh Circuit's decision in *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way*

Employes, No. 86-1666 (7th Cir. June 4, 1986), held that there is no basis for holding that either the RLA or the ICA of their own force authorize injunctions against secondary picketing particularly in view of the Norris-LaGuardia Act. These conclusions are contrary to both the stated Congressional purpose for each act and their legislative histories.

A. The Railway Labor Act Provides A Basis For An Injunction.

BMWE has argued that the silence of the RLA with respect to secondary picketing must be construed as a recognition of its legitimacy in the rail industry. A review of the principal purposes of the RLA and the context in which it was adopted leads inexorably to a contrary conclusion.

The explicit primary purpose of the RLA is to avoid "any interruption to commerce or to the operation of any carrier engaged therein". 45 U.S.C. § 151(a). That goal has been continuously recognized by this Court. *See Detroit & Toledo SLRR v. United Transportation Union*, 396 U.S. 142 (1969); *Virginian Railway Co. v. System Federal No. 40*, 300 U.S. 515 (1937); *Texas & NORR v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930).

In order to effect this overriding national purpose, Congress included in the Act an exhaustive framework for the resolution of labor disputes in the rail industry. Detailed procedures must be followed to resolve "all disputes concerning rates of pay, rules, or working conditions. . . ." 45 U.S.C. § 151(a)(4). These various issues have been categorized into what the industry terms "major" and "minor" disputes. *See, e.g., Elgin J&E Railway v. Burley*, 325 U.S. 711

(1945). Disputes concerning the interpretation or application of existing collective bargaining agreements are decided by adjustment boards whose decisions are binding upon the parties. 45 U.S.C. § 153. These issues are termed "minor" disputes.

The more serious issues, including conflict over the alteration and negotiation of collective bargaining agreements, face resolution by far more complex procedures, including negotiation, mediation, arbitration and conciliation. 45 U.S.C. §§ 155-160. These issues are the so-called "major" disputes.

The courts have struggled to reach an accommodation between these policies and anti-injunction statutes since before the RLA was adopted. Indeed, from the time that § 20 of the Clayton Act, 15 U.S.C. § 17, was first adopted to restrain the use of an injunction in disputes involving conditions of employment, the courts have declined to enforce the statutory prohibition literally in secondary activity situations. Judicial interpretation through the years had created exceptions to legislation prohibiting the issuance of injunctions preventing secondary boycotts. *See, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) and *Bedford Cut Stone Co. v. Stone Cutters Assoc.*, 274 U.S. 37 (1927).[6]

In 1937 this Court approved the issuance of an injunction directing the carrier to "treat with" and

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[6] In 1932 Congress enacted Norris-LaGuardia in direct response to these two decisions and in an effort to put to rest the question of whether injunctions could be issued in "cases involving or growing out of" a labor dispute. While the RLA was adopted prior to Norris-LaGuardia the latter statute made no reference to whether injunctions could or could not be issued in railroad strike situations.

deal exclusively with the certified bargaining representative of its employees, and prohibiting the carrier from organizing its own internal union. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). In examining the application of the Norris-LaGuardia Act, this Court stated:

> The evident purpose of this section, as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court.

300 U.S. at 563.

In its 1957 decision of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), the Court stated:

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these acts are reconcilable.

353 U.S. at 40. Thus, the issuance of an injunction despite Norris-LaGuardia was authorized by this Court.

As we have seen, the courts consistently have accommodated the seemingly unambiguous language of Norris-LaGuardia to other federal legislation. This long history of judicial interpretation is supported by an unwavering path of legislative history from the

adoption of the Clayton Act through Norris-La-Guardia and the anti-boycott provisions of the NLRA.

In reviewing the historical context, one must begin with the adoption of the Clayton Antitrust Act in 1914. The legislative history of that act demonstrates convincingly that secondary boycotts were viewed as unlawful by the Congress. In discussing the purpose of § 20, Congressman Webb, who shepharded the bill through the House of Representatives, stated:

> This section was drawn . . . with the careful purpose not to legalize the secondary boycott, and we do not think it does . . . and it is not intended to do so.
>
> * * *
>
> [This section] was drawn carefully, and those who drew this section drew it with the idea of excluding the secondary boycott. It passed the House . . . and the question of a secondary boycott was not raised then, because we understood so clearly it did not refer to or authorize a secondary boycott.

51 Cong. Rec. 9652-53 (1914).

Turning to the legislative history of Norris-La-Guardia itself, it is clear that Congress believed that its passage would not deprive the federal courts of power to grant injunctions to prevent abusive work stoppages in the railroad industry. For example, Congressman LaGuardia, a sponsor and proponent of the bill, responded as follows to the concern that the Act would permit rail unions to shutdown the rail system by means of a nationwide strike:

> Mr. Lankford of Virginia: [Will the act] make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?
>
> Mr. LaGuardia: I think the gentlemen was a member of the House in 1926?
>
> Mr. Lankford of Virginia: No.
>
> Mr. LaGuardia: We then passed the Railroad [sic] Labor Act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.
>
> * * *
>
> Mr. Lankford of Virginia: It does not apply to the transportation of milk or other necessities that go in interstate commerce?
>
> Mr. LaGuardia: Interstate traffic is entirely covered in the Railroad [sic] Labor Act of 1926.

75 Cong. Rec. 5499 (1932).

Congressman LaGuardia made his view that the bill did not apply to the railroad industry even clearer in responding to a claim by Congressman Beck that the bill might be construed as permitting a rail labor dispute to "paralyze interstate transportation from the Atlantic to the Pacific":

> The bill, I will say to the gentleman from Pennsylvania, in no way repeals the Railroad [sic] Labor Act, and three-fourths of the argument of the gentleman from Pennsylvania

> was directed against interference with transportation in interstate commerce; and the gentleman is a sufficiently good lawyer to know the provisions of the Railroad [sic] Labor Act, which was passed in 1926.
>
> Was it to create fear; was it to create prejudice? I will not charge that to the gentleman from Pennsylvania; but it was most unbecoming for a lawyer of his standing to direct his fire entirely on the interruption of transportation of interstate traffic, when there is another law which will take care of that situation.
>
> Gentlemen, this bill does not—and I cannot repeat it too many times—prevent the court from restraining any unlawful act.

75 Cong. Rec. at 5472 and 5478.

These words from the sponsor of the Norris-LaGuardia Act demonstrate that it was the view of the Congress when adopting the bill that it did not prohibit a court from enjoining a secondary boycott in the railroad industry.

Finally, a review of the legislative history of the anti-secondary boycott provisions of the Taft-Hartley Act, 29 U.S.C. § 158(b)(4), discloses that railroad activity was not included in the 8(b)(4) prohibitions because secondary boycotts in the rail industry were already considered illegal by the Congress. During one portion of the debate, Senator Taft, a sponsor of that bill, responded to a question by Senator McGraff:

> Mr. McGraff: The thought occurred to me, in listening to the discussion by the very em-

> inent Senator from Montana, that by the incorporation of these restrictive provisions with respect to other types of labor we are making a rather unfair distinction between American labor unions. The railroad systems can do certain things that other employees are prohibited by federal law from doing. I am wondering if someone can enlighten us on the justification for that sort of distinction.
>
> * * *
>
> Mr. Taft: I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act. In general, we confined our amendments to the bill to acts which, from evidence shown before the Committee, were specifically shown to be abuses.

93 Cong. Rec. 6657-58 (1947).

The legislative history of these three acts when taken together demonstrates clearly Congress's understanding when it adopted the provisions over a period of more than 30 years that secondary boycotts were illegal in the railway industry and that any type of labor activity in the rail industry was governed by the RLA. The decision of the Court of Appeals here and those of the Courts of Appeals of the District of Columbia, Second and the Seventh Circuits have gut-

ted the very purpose of the RLA which is to prevent an unjustified shutdown of the national rail system.

The irony of the lower court's decision is self-evident. In 1927 Congress adopted the RLA which singles out the rail industry, then and now (with the addition of the airline industry), as the only industry in which labor relations were to be accorded special treatment with exhaustive procedures vital to the transportation industry of the entire nation.

Because of this overriding national interest, it was the express intent of Congress to forestall within the limits of the Commerce Clause a shutdown of this industry not only on the local level, but also on a national level through a national strike. In short, one of the very purposes in adopting the RLA was to prevent exactly what has happened in this case.

The BMWE represents approximately 100 active workers employed by the MEC and PT. That railroad serves three states in New England. As a result of this geographically isolated dispute, the decision of the Court of Appeals (and the acknowledged purpose of BMWE's picketing here) is to permit a nationwide shutdown of the entire rail system of the United States. That result is absurd, and could not have been the intent of the Congress in adopting the RLA.

B. The Interstate Commerce Act Provides A Basis For an Injunction.

In addition to the paramount purposes of the RLA, the District Court also had jurisdiction to issue an injunction pursuant to the ICA. The federal district courts have "original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce. . . ." 28 U.S.C. § 1337. The federal

jurisdiction under the ICA exists where the remedy sought is inferable from the act or hinges on an interpretation of it. *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir. 1974).

The ICA requires common carriers subject to its jurisdiction to provide "safe and adequate" transportation service "on a reasonable request". 49 U.S.C. § 10101(a). A carrier may be liable to a third party in a damage action for the breach of this duty even when it is beset by labor controversies. *Brotherhood of Railway Clerks v. Florida East Coast Railway*, 384 U.S. 238, 245 (1966). At least two courts of appeals have recognized that the duties imposed by the ICA create corresponding federal rights to relief from unprivileged interference with the carrier's performance of these rights. *Ashley, Drew*, 625 F.2d at 1370; *Toledo P&W Railroad v. Brotherhood of Railroad Trainmen*, 132 F.2d 265 (7th Cir. 1942), *rev'd on other grounds*, 321 U.S. 50 (1944).

The picketing undertaken by the BMWE was an unprivileged interference with the RF&P's obligations under the ICA. In similar circumstances, the Eighth Circuit has explicitly recognized that injunctive relief is appropriate to protect the common carrier from undue interference with its obligation to provide service upon a reasonable request. *See Ashley, Drew*, 625 F.2d at 1370.

Thus, the obligations imposed upon a carrier by the ICA, when read in conjunction with the RLA, indicate an express Congressional intent to provide the public with the legal framework that is aimed at insuring, to the extent possible, uninterrupted rail service and discouraging work stoppages in the rail industry. If Norris-LaGuardia impinges upon those Congressional

intentions, then Norris-LaGuardia must accommodate the Congressional aims embodied in the ICA.

To conclude otherwise would grant to the labor union the power to take economic action against any railroad in the country whether or not such railroad has any relationship to the primary labor dispute. It would also give the union the concomitant power to shut down the entire railraod industry even though the only labor dispute it has is confined to a small regional railroad. Further, the neutral railroads are defenseless against shipper's claims that carriers have failed to fulfill their obligations under the ICA to supply uninterrupted service. This cannot have been the intent of the Congress.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in order that the decision of that Court be reversed.

Respectfully submitted,

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September 26, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3544

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY,

Appellant,

versus

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 86-352-A)

Argued: May 5, 1986 Decided: July 11, 1986

Before WIDENER, HALL and MURNAGHAN, Circuit Judges.

Fred Calvin Alexander (Thomas F. Farrell, II; Clifford R. Oviatt, Jr.; Boothe, Prichard & Dudley; Urchie B. Ellis, Vice-President of Law, Richmond, Fredericksburg and Potomac Railroad Company on brief) for Appellant; John O'Brien Clarke, Jr. (Highsaw & Mahoney, P.C.; Louis P. Malone, III, General Counsel, Brotherhood of Maintenance of Way Employes on brief) for Appellee.

HALL, Circuit Judge:

Richmond, Fredericksburg and Potomac Railroad Company ("RF&P") appeals from orders of the district court denying its motions for preliminary injunctions in this action brought against the Brotherhood of Maintenance of Way Employes (the "BMWE"). In April, 1986, RF&P filed suit against the BMWE pursuant to the Railway Labor Act (the "RLA"), seeking to enjoin the union's picketing of its facilities at Alexandria and Richmond, Virginia. The picketing occurred during the pendency of a labor dispute between the BMWE and two New England railroads regarding pay and working conditions. Following RF&P's motions for preliminary injunctions to prohibit further picketing of its Alexandria and Richmond facilities, the district court concluded that it lacked jurisdiction to award the requested relief. We affirm.

I.

RF&P is a major railway carrier connecting the northeastern and southeastern parts of the United States. It operates two railroad yards, the Potomac Yard in Alexandria and the Acca Yard in Richmond, both of which have recently been picketed by the BMWE.

The BMWE has been involved in a labor dispute with the Maine Central Railroad Company ("MEC") and its subsidiary, the Portland Terminal Company ("PT"). The MEC and PT, together with the Delaware & Hudson Railway ("D&H") and the Boston & Maine Corporation ("B&M"), are part of the Guilford Rail System, of which Guilford Transportation Industries, Inc., is the parent corporation. After exhausting the statutory procedures of the RLA without success in resolving the dispute, the union went on strike against MEC on March 3, 1986. Later that month the BMWE extended its picketing activities to the B&M and the D&H.

On April 2, 1986, MEC and PT broke off negotiations with the BMWE. The National Mediation Board, operating

under the authority of the RLA, 45 U.S.C. § 151, then recessed its public interest mediation efforts without setting a future date for negotiations. The union asserts that it decided to extend its picketing further to include RF&P's Alexandria facilities in order to put economic pressure on the Guilford Rail System to bring MEC and PT back to the bargaining table.[1]

On April 4, 1986, the BMWE posted pickets at Potomac Yard. Employees of RF&P and four tenant railroads refused to cross the union's picket lines. RF&P immediately sought to enjoin the picketing, alleging that such activity had a serious impact on its ability to perform services for the railroads, including those which were not involved in the MEC/PT dispute. On the same day that RF&P's action was filed, the district court denied appellant's request for a temporary restraining order ("TRO") and a preliminary injunction. The district court concluded that although RF&P appeared to be a neutral, "it's not completely disinterested in the underlying labor dispute in that it has an association and does some business with the [MEC] and [PT], which do have the underlying labor dispute and which

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[1] According to the affidavit of William E. LaRue, international vice-president of the BMWE, filed with the district court:

> The D&H operates into plaintiff Richmond, Fredericksburg & Potomac Railroad's (RF&P) yard in Alexandria, Virginia (*i.e.*, the Potomac Yard), and obtains substantial traffic by interchange with other railroads in that yard. The BMWE has determined that it is important to the effectiveness of its strike against MEC/PT to ask D&H employees and other rail employees in the RF&P's Potomac Yard to withdraw their services from their employers in order to prevent the movement of rail cars to or from the Guilford Rail System. This action is necessary to place sufficient economic pressure upon the Guilford Rail System to convince them that it is in their economic interests to have the MEC/PT resume negotiations with the BMWE in order to resolve the disputes with this labor organization over rates of pay, rules and working conditions for employees which the BMWE represents on the MEC and PT.

are of the same industry." Under these circumstances, the district court found that the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the court of jurisdiction to award injunctive relief.

On April 9, 1986, the union commenced picketing activity at RF&P's facilities in Richmond. The following day, RF&P returned to district court, seeking a TRO and preliminary injunction to enjoin the new picketing. Again, the district court denied relief on jurisdictional grounds.[2]

This appeal followed.[3]

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[2] In both instances the district court also denied injunctive relief pending appeal. RF&P then moved this Court for a stay of the district court's orders, pursuant to Fed. R. App. P. 8(a). On April 12, 1986, Judge Widener, as a single judge, granted an injunction in favor of RF&P pending appeal and expedited the appeal for consideration by this panel. Brotherhood of Maintenance of Way Employees v. Richmond, Fredericksburg and Potomac R.R. Co., No. 86-3544 (4th Cir. April 12, 1986), *cert. denied*, 54 U.S.L.W. 3838-39 (U.S. June 23, 1986) (No. 85-1792). After hearing argument, the panel on May 5, 1986, entered an order dissolving the injunction pending appeal (Judge Widener dissenting).

[3] After we heard argument in this case, President Reagan, acting pursuant to 45 U.S.C. § 160, issued an executive order on May 16, 1986, which convened an emergency board to investigate the dispute between the union and MEC/PT and issue a report within thirty days. 45 U.S.C. § 160 provides that in the meantime and "for thirty days after [the] board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

We find that the executive order does not make this case moot in light of the fact that the substantive dispute between the union and MEC/PT continues, and unless settled by negotiations or resolved by legislation, will be reactivated thirty days following the report to the President. Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, No. 86-1666, slip op. at 4-5 (7th cir. June 4, 1986).

II.

On appeal, RF&P contends that, contrary to the district court's conclusion, a federal court has jurisdiction to enjoin the picketing of a neutral railroad employer in order to accommodate the mandates of both the Railway Labor Act and the Interstate Commerce Act. Appellant further argues that injunctive relief is permissible where the neutral railroad is not substantially aligned with the railroad involved in the primary dispute with the union. We disagree with each of RF&P's contentions.

At the outset, we note that the union exhausted the procedures of the RLA and thereafter engaged in a lawful strike against the MEC/PT. Moreover, the union's secondary picketing against the RF&P has been peaceful. Absent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the constitution. *See N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886 (1982); *American Federation of Labor v. Swing,* 312 U.S. 321 (1941); *Thornhill v. State of Alabama,* 310 U.S. 88 (1940). Significantly, the Supreme Court has held that in railroad disputes subject to the RLA until congress acts, peaceful picketing in both primary and secondary situations is conduct which may not be proscribed by a state. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369 (1969). The question which we must resolve in this appeal is whether a federal court may enjoin such activity.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides in pertinent part that:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or

interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do nor not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.

The plain language of this statute severely limits the power of a federal court to enter the labor dispute area. A case is deemed to involve or grow out of a labor dispute:

> when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more em-

> ployees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

29 U.S.C. § 113(a). The Act defines "labor dispute" broadly:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). And finally,

> A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

29 U.S.C. § 113(b).

Despite the sweeping language of the Norris-LaGuardia Act, RF&P maintains that the statute cannot be viewed in isolation. According to appellant, the district court had

jurisdiction to issue an injunction prohibiting the picketing at issue here in order to accommodate the Railway Labor Act and the Interstate Commerce Act and to protect the public interest in avoiding interruption of commerce. The railroad's argument, however, would have us ignore the Supreme Court's decision in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982).

In *Jacksonville Bulk*, the longshoremen's union, reacting to the Soviet Union's intervention in Afghanistan, refused to load certain goods on ships bound for the Soviet Union. The employer then brought suit pursuant to the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that the union's work stoppage violated the terms of the collective-bargaining agreement which contained a no-strike clause and a provision requiring arbitration of disputes. The Supreme Court held that (1) the broad anti-injunction provisions of the Norris-LaGuardia Act apply even to politically motivated work stoppages, and (2) the work stoppage in question was not an arbitrable dispute which could be enjoined under the collective bargaining agreement. Addressing the issue of what constitutes a labor dispute, the Supreme Court found that the Norris-LaGuardia Act does not require that "each" dispute relevant to the case be a labor dispute, but merely requires that the case involve "any" labor dispute. 457 U.S. at 711. Moreover, according to the Supreme Court, the plain terms of the Norris-LaGuardia Act deprived the federal courts of the power to enjoin the union's work stoppage, precipitated by the Soviet invasion of Afghanistan, without regard to whether the union also had a nonlabor dispute with another entity. *Id.* Finally, the supreme Court reiterated the long-standing principle that the Norris-LaGuardia Act's broad prohibition against injunctions in any labor dispute will not be constricted "except in narrowly defined situations where necessary to accommodate the Act to specific federal

legislation or paramount congressional policy." *Id.* at 708. *See also, id.* at 720..

We perceive no specific legislation or paramount congressional policy, either in the RLA or in the Interstate Commerce Act, which would support an "accommodation" exception to the anti-injunction mandate of Norris-LaGuardia, under the facts presented by this case. Appellant cannot simply rely on the general purposes of these statutes, i.e. to provide uninterrupted rail service and safe and adequate transportation, in order to supply the specific congressional policy necessary to override Norris-LaGuardia's prohibition of injunctive relief.

In *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes,* No. 86-1666 (7th Cir. June 4, 1986), the Seventh Circuit addressed a similar claim by Burlington Northern which sought to challenge the BMWE's secondary picketing of the railroad's Chicago facilities in connection with the same dispute at issue here involving the Guilford System railways. In concluding that the Norris-LaGuardia Act prohibited the issuance of injunctive relief, the Seventh Circuit rejected the railroad's claim under the Interstate Commerce Act:

> The Supreme Court has held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, non-labor statute. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.,* 362 U.S. 330, 339 (1969); *Drivers' Union v. Lake Valley Co.,* 311 U.S. 91, 103 (1940).

Id. at 11-12. *Accord, Central Vermont Railway, Inc. v. BMWE,* No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986).

Moreover, as the Seventh Circuit in *Burlington Northern* found, there is no basis for holding that the RLA of its own force authorizes injunctions against secondary pick-

eting.[4] As long as the statutory procedures of the RLA have been exhausted and the primary strike is lawful, the Norris-LaGuardia Act applies to prevent a federal court from enjoining the union's resort to secondary picketing. *Burlington Northern, supra,* slip op. at 13-23.[5]

III.

RF&P next argues that injunctive relief is permissible under the Norris-LaGuardia Act where there is no showing that the picketed neutral railroad has aided, supported or aligned itself with the railroad involved in the primary

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[4] There is nothing in the RLA comparable to Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), which prohibits certain forms of secondary picketing by non-rail labor. *See* Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 376 n.10 (1969).

[5] We do not read Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co., 353 U.S. 30 (1957), or Piedmont Aviation v. Airline Pilots Association, 416 F.2d 633 (4th Cir. 1969), *cert. denied,* 397 U.S. 926 (1970), relied upon by RF&P, to dictate a different conclusion. In *Chicago River,* the Supreme Court sanctioned an injunction against a strike over a minor dispute that was pending under the RLA before the National Railroad Adjustment Board. Similarly, in *Piedmont Aviation,* this Court found that the parties had an obligation to bargain under the provisions of the RLA before going on strike. *Cf.* Boys Markets, Inc. v. Retail Clerks' Union, Local 770, 398 U.S. 235 (1970) (Norris-LaGuardia Act did not prohibit injunction where it was undisputed that grievance in question was subject to adjustment and arbitration under collective-bargaining agreement and that employer was ready to proceed with arbitration at time injunction was sought and obtained).

In the instant case, however, RLA procedures have been exhausted and, in contrast to *Boys Market, Chicago River,* and *Piedmont Aviation,* there is no duty to arbitrate which could be the basis of a federal court injunction. *Cf.* Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976) (*Boys Markets* exception did not apply when only the question whether a sympathy strike violated the no-strike pledge, and not the dispute that precipitated the strike, was arbitrable under the parties' collective bargaining agreement).

dispute with the union. Both the Fifth and the Eighth Circuits have adopted a "substantial alignment" exception to Norris-LaGuardia. *Ashley, Drew and Northern Railways v. United Transportation Union,* 625 F.2d 1357 (8th Cir. 1980); *Brotherhood of Railway Trainmen v. Atlantic Coastline Co.,* 362 F.2d 649 (5th Cir. 1966). *See also, Western Maryland R.R. Co. v. System Board,* 465 F.Supp. 963 (D. Md. 1979). Several other circuits, however, have rejected the exception, including some which have recently done so in the context of related secondary picketing activity by the BMWE against other railroads neutral in the dispute with the MEC/PT. *Burlington Northern Railroad Co. v. BMWE,* No. 86-1666 (7th Cir. June 4, 1986); *Central Vermont Railway, Inc. v. BMWE,* No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986). *See also Smith's Management Corp. v. Electrical Workers,* 737 F.2d 788 (9th Cir. 1984). RF&P urges that this Circuit adopt a "substantial alignment" exception and apply it here to permit injunctive relief. Given the expansive definition of a "labor dispute" under the Norris-LaGuardia Act and the Supreme Court's admonition to construe this term broadly, see *infra,* Part II, we see no basis for such an exception and decline to adopt it for the reasons cogently stated by the Seventh Circuit:

> Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer . . . A court applying the "substantial alignment" test is weighing the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help—not the court—must de-

cide how "substantial" an "alignment" ought to be to make secondary pressure appropriate.

Burlington Northern Railroad Co. v. BMWE, supra at 27-28.

IV.

For the foregoing reasons, the orders of the district court denying preliminary injunctive relief are affirmed.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

At the outset, I should call attention to the fact that the setting in which the majority places this case is copied from the remarks of the district judge during argument and an affidavit filed in the district court, both of which are to the effect that although RF&P appeared to be a neutral it was not completely disinterested in the underlying labor dispute in that it has an association and does some business with Maine Central and Portland Terminal, which of course are in the same industry.

The problem with this fact finding on which the majority bases its opinion is that it leaves the impression that this case is a sort of substantial alignment case, though not expressed in words.

The majority does not take into account, however, and ignores two separate fact findings of the district court made in its orders of April 4, 1986 (concerning the Potomac yard) and April 10, 1986 (concerning RF&P's Richmond facility). The April 4th order finds that RF&P is "a neutral," and the April 10th order also finds that RF&P is "a neutral," and "there is no showing that any such picketing will result in any economic impact on the . . . [union]." This fact finding in an order of the court must be accepted rather than the remarks of the judge and the affidavit filed in the district court. We have addressed this subject on two occasions and held in each that a court speaks through its judgments and orders. If the order of the court is contrary to an observation made by the judge in the transcript, and of course that would apply to the affidavit in this case also, it is the order which controls. *Murdaugh Volkswagen v. First Nat. Bank of S.C.*, 741 F.2d 41 (4th Cir. 1984); *Segars v. Atlantic Coastline RR Co.*, 286 F.2d 767 (4th Cir. 1961).

Far from arguing, as does the majority, that there may be some kind of tangential substantial alignment, the union embraces the district court's fact finding and takes the position that it may picket any railroad in the United States whether or not the picketed railway has any connection with the union or with the strike in Maine or with the parties to the strike in Maine. In other words, the union insists on its right to picket a neutral, as RF&P has been found to be.

I believe that the substantial alignment test of *Ashley, Drew*[1] should be applied in this case to give a federal court jurisdiction to enjoin BMWE's picketing of the RF&P's railroad yards. I also disagree with the majority's conclusion that *Jacksonville Bulk Terminals* requires that we ignore the public interest of avoiding interruption of commerce. Under the majority's interpretation of the Norris-LaGuardia Act, 29 U.S.C. § 104, et seq., BMWE can engage in picketing of any railroad facility in the country regardless of its complete disassociation from the underlying strike in Maine. I believe that such an overly broad construction of the Norris-LaGuardia Act fails to properly accommodate with the Norris-LaGuardia Act the purposes of the Railway Labor Act, 45 U.S.C. 151, et seq., and the Interstate Commerce Act, Title 49 U.S.C., esp. Ch. 111.

I disagree with the majority's broad reading of *Jacksonville Bulk Terminals.*[2] In that case, the Supreme Court was asked to decide the power of a federal court to enjoin a labor dispute based upon a politically motivated work stoppage. The fact there was that the union refused to provide labor to the employer to handle cargo bound to, or coming from, the Soviet Union, or carried on Russian ships. The cause of the union's action was the Soviet in-

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[1] *Ashley, Drew & Northern Ry. v. United Transportation Union,* 625 F.2d 1357 (8th Cir. 1980).

[2] *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.,* 457 U.S. 702 (1982).

tervention in Afghanistan. The Court held that a federal court did not have jurisdiction under the Norris-LaGuardia Act to enjoin the work stoppage because the underlying dispute was not arbitrable under the terms of the collective bargaining agreement. The Court was concerned only with the reach of those anti-injunction provisions as they related to what was obviously and in fact a labor dispute but which was based on political motives. The Court was not called upon to rule on Norris-LaGuardia's applicability absent a labor dispute. Nor was it called upon to consider any accommodation between Norris-LaGuardia and the Railway Labor Act. See *Trainmen v. Chicago R & I R Co.*, 353 U.S. 30, 40 (1957). *Jacksonville Bulk Terminal* did, however, recognize that exceptions to Norris-LaGuardia can exist "where necessary to accommodate [that] Act to specific federal legislation or paramount congressional policy." Id. at 708. "There must be an accommodation of . . . [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." *Trainmen* at 40.

Such congressional policy is found in the Interstate Commerce Act and the Railway Labor Act itself as expressed policy against interference with the flow of interstate commerce.

I believe that *Railroad Trainmen v. Terminal Co.*, 394 U.S. 69 (1969), is more nearly on point to the issues at hand than is *Jacksonville Bulk Terminals* because *Railroad Trainmen* dealt directly with the Railway Labor Act and its relation to the Norris-LaGuardia Act which, as I have noted, *Jacksonville Bulk Terminals* did not. In *Railroad Trainmen,* the Court concluded that state law was preempted and that the Railway Labor Act permitted unions to employ a range of peacefully economic power, "so long as its use conflicts with no other obligation imposed by federal law." Id. at 392. That federal law is the prohibition against interference with interstate commerce. I disagree with the majority's conclusion that such a broad

congressional policy is not enough to support accommodation between the Railway Labor Act, the Interstate Commerce Act and the Norris-LaGuardia Act. Slip op. at 10. By rejecting the basic principles governing the free flow of commerce, the majority allows the BMWE to bring the nation's entire rail system to a halt because of a labor dispute it has with a small railroad in New England.

I believe that the Eighth Circuit's approach in *Ashley, Drew* is a far more reasonable method in striking harmony in this area of the law. Also in accord is *Brotherhood of Railroad Trainmen v. Atlantic Coastline Co.*, 362 F.2d 649 (5th Cir.), affirmed by an equally divided court, 385 U.S. 20 (1966). *Ashley, Drew* teaches that Norris-LaGuardia's anti-injunction provisions cannot be reasonably applied without looking at both the character of the parties and the subject matter of the dispute. Id. at 1365. After reviewing a long line of precedents, the Eighth Circuit concluded that

> it is reasonable to conclude that Section 13(a) [of Norris-LaGuardia, 29 U.S.C. 113(a)] was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield to union activities beyond the place where the union's interest in a labor dispute ceases."

Ashley, Drew at 1366.

In order to fall within the scope of Norris-LaGuardia's anti-injunction provisions, the union must show that the picketed company is substantially aligned with the company involved in the underlying labor dispute. In the case before us, BMWE has shown no substantial alignment between RF&P and the Maine Central. The district court twice found that the RF&P is "a neutral." I would adopt the reasoning of *Ashley, Drew* and would allow federal court intervention under the facts of this case. I think

application of the Norris-LaGuardia Act is inappropriate here because the picketing of RF&P's yards does not involve or arise out of the only possible labor dispute in this record: the dispute between the BMWE and the Maine Central in Maine.

Because the RF&P is not substantially aligned with the Maine Central and has no dispute with Maine Central, labor or otherwise, I would reverse the order of the district court declining to enjoin picketing at railway facilities having no connection whatsoever with the labor dispute in Maine.

The requirements of time (this dissent is transmitted by facsimile to our clerk's office for filing) prevent a more extended discussion of this most interesting and close question. In this respect, I should add that I especially rely upon the reasoning, as did *Ashley, Drew* to some extent, in the treatise *Labor and the Law,* Gregory & Katz (3d ed.) ch. VII, especially p. 184, et seq.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3544

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY,
Appellant/Plaintiff

versus

BROTHERHOOD OF WAY MAINTENANCE OF WAY EMPLOYEES,
Appellee/Defendant

Appearances: Fred C. Alexander, Jr., Esquire
Clifford R. Oviatt, Esquire
Thomas F. Farrell, II, Esquire
for RF&P Railroad Company

John O. Clarke, Jr., Esquire
for Brotherhood of Maintenance
of Way Employes

ORDER

This motion for an injunction pending appeal is before me as a single judge on account of the requirements of time.

This dispute is a result of, second, third or fourth hand as one may consider the case, a labor dispute between the Brotherhood and the Maine & Central Railroad and the Portland Terminal Company, which may be referred to hereafter as Maine & Central. Maine & Central and the Brotherhood have reached an impasse in their dispute over recognized subjects of bargaining such as conditions of

employment and rates of pay, and the emergency procedures under the Railway Labor Act have not been invoked. Maine & Central is a subsidiary of the Guilford group, as is Delaware & Hudson Railroad. Maine & Central does not go south of New Hampshire and Vermont, but Delaware & Hudson runs into Alexandria, Virginia, where the yard is owned and operated by RF&P. The Union has not shown any substantial alignment between Maine & Central and Delaware & Hudson, not to say that the same might not be shown; however, it does not appear.

The Brotherhood has struck Maine & Central and is picketing the Alexandria yard of RF&P, advertising its dispute with Maine & Central. As a result, RF&P employees will not cross the picket line to work in that yard which serves not only Delaware & Hudson and RF&P but also several other railways, including Conrail, et al.

The Brotherhood has also picketed RF&P's yard in Richmond, advertising its dispute with Maine & Central, and RF&P employees there will not cross the picket line. The RF&P yard in Richmond serves neither Maine & Central nor Delaware & Hudson, although such cars pass through that yard going both north and south.

RF&P has had both a TRO and a preliminary injunction denied by the district court as it sought to stop the picketing at the Alexandria and Richmond yards of RF&P. RF&P is required by law to serve all railways which use its yards, and it is undenied that the picketing causes a considerable interference with interstate commerce, both at the Alexandria yard and at the Richmond yard. I take it as a given that such an interference may be enjoined.

The Brotherhood takes the position that its picketing, which is peaceful, may not be enjoined under the Norris-Laguardia Act, see 29 U.S.C. § 104, et seq, because it is involved in the labor dispute with Maine & Central and it thus has a right to advertise that dispute by picketing anywhere within the railroad industry, whether or not the

site of the picketing has any connection with Maine & Central. It bases its case on *Jacksonville Bulk Terminals v. Longshoremen,* 457 U.S. 702 (1982). In the *Jacksonville* case, the Court held, in a dispute between an employer and its union under the terms of a collective bargaining agreement, that an injunction might not issue because of the Norris-LaGuardia Act when the dispute between the employer and the union was not an arbitrable dispute. Since there was in fact a dispute, the Court held that courts should not inquire into the motive behind the dispute which in that case was shipping goods to Russia which had recently taken over Afghanistan.

I do not read *Jacksonville* as broadly as does the Brotherhood. There is no labor dispute here between RF&P and the Brotherhood. Therefore, I think it doubtful that the Norris-LaGuardia Act forbids an injunction to issue in this case merely because the Brotherhood is in a dispute with Maine & Central. The Brotherhood is not in a dispute with RF&P. I should add that neither is the Brotherhood in a dispute with Delaware & Hudson, it having a separate collective bargaining agreement from the one in controversy.

A case which is nearer to the holding sought by the Brotherhood is *Railroad Trainmen v. Terminal Company,* 394 US. 369 (1969). In that case, the Court held an injunction should not issue under state law against picketing a terminal jointly owned by a railroad which made 30% of the interchanges at the terminal, among other uses, and was in a labor dispute with the union involved. The Court held that state law was preempted and that the Railway Labor Act left open whatever peaceful economic power the union had so long as its use conflicted "with no other obligation imposed by federal law," 394 U.S. at 392. So, if there were no other obligation imposed by federal law, the injunction in this case might not issue. But it seems to me that the interference with interstate commerce is a sufficient other obligation imposed by federal law that

has been violated in this case; at least it appears that way to me now on the papers at hand and upon argument of counsel.

In deciding whether or not to issue an injunction pending appeal, I take into account that the harm done the plaintiff is irreparable in its loss of revenues. I think the plaintiff is more than likely to succeed on appeal. I am cognizant of the fact that the strike may be prolonged by the Brotherhood's inability to picket entire strangers to the controversy, but I do not think the law supposes that the Brotherhood, as it candidly claims, may picket any railway installation anywhere in the United States on account of a dispute which, in its broadest terms, is in Maine, New Hampshire and Vermont.

I am thus of opinion an injunction pending appeal should issue. I should say that may decision is supported by *Ashley, Drew & No. Ry. v. UTU,* 625 F.2d 1357 (8th Cir. 1980), and *Western Md. RR Co. v. System Bd.,* 465 F.Supp 963 (D. Md. 1979), and may well be contrary to *Smith Management Corp.v. IBEW,* 737 F.2d 788 (9th Cir. 1984).

For the foregoing reasons, it is accordingly ADJUDGED and ORDERED as follows:

I

The Brotherhood shall withdraw its pickets from the Alexandria and Richmond yards of the RF&P Railway during the pendency of this appeal or until further order of the court.

II

This appeal is expedited to be heard at the May term of this court.

III

While the terms of this order are in effect immediately,

as a condition for its continuance beyond April 18, 1986, the plaintiff or someone for it shall enter into bond, conditioned as the law directs, in the sum of $100,000 to be filed with the clerk of this court.

The attorneys objected to every adverse ruling in this order for all of the reasons which would be supported by the record.

Enter this 12th day of April 1986.

/s/ H. EMORY WIDENER, JR.
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 86-352-A

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY,

Plaintiff,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Defendant.

ORDER

For the reasons stated from the bench, it appearing that the Railway Labor Act procedures for resolution of the underlying labor dispute have been unsuccessfully exhausted by the defendant; that the peaceful picketing by the defendant against the plaintiff, a neutral, arises out of a labor dispute; and pursuant to § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, this court lacks jurisdiction to award the injunctive relief requested by the plaintiff, it is hereby

ORDERED that the application of the plaintiff for a temporary restraining order and preliminary injunction is denied.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
April 4th, 1986

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 86-352-A

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY,

Plaintiff,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Defendant.

ORDER

The court being of the opinion that this is a "case involving or growing out of any labor dispute" within the meaning of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, even though the picketing is of a neutral in Richmond, Virginia, and there is no showing that such picketing will result in any economic impact on the defendant [*Cf. Jacksonville Bulk Terminals, Inc., et al.* v. *International Longshoremen's Association, et al.*, 457 U.S. 702 (1982)], and that therefore this court lacks jurisdiction to award the injunctive relief sought, it is hereby ORDERED that:

1. The application of the plaintiff for a temporary restraining order filed on April 10, 1986, is denied.

2. The application of the plaintiff for a preliminary injunction filed on April 10, 1986, is denied.

3. Plaintiff having indicated its intention to appeal from the foregoing rulings, the clerk is directed to transmit to

the United States Court of Appeals for the Fourth Circuit the entire original record in this action.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
April 10th, 1986

APPENDIX D

THE CLAYTON ANTI-TRUST ACT

15 USC § 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
(Oct. 15, 1914, ch 323, § 6, 38 Stat. 731.)

THE NORRIS-LAGUARDIA ACT

29 USC § 101. Limitation on issuance of restraining orders and injunctions

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.
(Mar. 23, 1932, c. 90, § 1, 47 Stat. 70.)

§ 104. Acts not subject to restraining order or injunction

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any

labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize an act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

(Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.)

29 USC § 113. Definitions—Labor dispute—Participants—courts included

When used in this Act, and for the purposes of this Act

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation, or have direct or indirect interests herein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

THE NATIONAL LABOR RELATIONS ACT

29 USC § 158

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i)to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are first distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . .

THE RAILWAY LABOR ACT

45 USC § 151a. General purposes

The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete in-

dependence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 USC § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a)that the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b)The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c)Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting

each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d)In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e)If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f)In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select

a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g)Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h)The said Adjustment Board shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division

and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the first Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinsts, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: to have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of

agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days

from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating

office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by

the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be des-

ignated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional board of adjustment for the purpose of adjustment and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending

before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the

members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

(May 20, 1926, ch 347, Title I, § 3, 44 Stat. 578; June 21, 1934, ch 691, § 3, 48 Stat. 1189; Apr. 10, 1936, ch 166, 49 Stat. 1189; June 20, 1966, P. L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, P. L. 91-234, §§ 1-6, 84 Stat. 199, 200.)

45 USC §155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a)A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b)Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that is mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior the time the dispute arose.

Second. Interpretation of agreement. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify

the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

(a)On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be deliv-

ered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

(May 20, 1926, ch 347, Title I, § 5, 44 Stat. 580; June 21, 1934, ch 691, § 5, 48 Stat. 1195; Apr. 10, 1936, ch 166, 49 Stat. 1189.)

45 USC § 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(May 20, 1926, ch 347, Title I, § 6, 44 Stat. 582; June 21, 1934, ch 691, §6, 48 Stat. 1197; Apr. 10, 1936, ch 166, 49 Stat. 1189.)

45 USC § 157. Arbitration

First. Submission of controversy to arbitration. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall

not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Manner of selecting board of arbitration. Such board of arbitration shall be chosen in the following manner:

(a)In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b)In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration; organization; compensation; procedure.

(a) Notice of selection or failure to select arbitrators. When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure. The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: Provided, however, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered. Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators. No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses. Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation

as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies. The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: Provided, however, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act as amended.

(g) Compensation of assistants to board of arbitration; expenses; quarters. A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; fees. All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

(May 20, 1926, ch 347, Title I, § 7, 44 Stat. 582; June 21, 1934, ch 691, § 7, 48 Stat. 1197; Apr. 10, 1936, ch 166, 49 Stat. 1189; Oct. 15, 1970, P. L. 91-452, Title II, § 238, 84 Stat. 930.)

45 USC § 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties re-

spectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the

district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: Provided, however, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board or arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this act, delivered to such board of arbitration. (May 20, 1926, ch 347, Title I, § 8, 44 Stat. 584; June 21, 1934, ch 691, § 7, 48 Stat. 1197; Apr. 10, 1936, ch 166, 49 Stat. 1189.)

45 USC § 159. Award and judgment thereon; effect on individual employee

First. Filing of award. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. Conclusiveness of award; judgment. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Impeachment of award; grounds. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;
(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or
(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: Provided further, That an award contested as herein provided shall be construed liberally

by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. Effect of partial invalidity of award. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: Provided, however, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. Appeal; record. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. Finality of decision of circuit court of appeals. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. Judgment where petitioner's contentions are sustained. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Duty of employee to render service without consent; right to quit. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

(May 20, 1926, ch 347, Title I, § 9, 44 Stat. 585; Apr. 10, 1936, ch 166, 49 Stat. 1189.)

45 USC § 160. Emergency board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board

shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.
(May 20, 1926, ch 347, Title I, § 10, 44 Stat. 586; June 21, 1934, ch 691, § 7, 48 Stat. 1197; Apr. 10, 1936, ch 166, 49 Stat. 1189.)

THE INTERSTATE COMMERCE ACT

49 USC § 10101. Transportation policy
(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;
(2) to promote safe, adequate, economical, and efficient transportation, including sound economic conditions among carriers;
(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
(5) to cooperate with each State and the officials of each State on transportation matters; and
(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.
(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1337.)

(2)

No. 86-503

Supreme Court, U.S.
FILED
OCT 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,

Respondent.

SUPPLEMENTAL PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-503

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,

Respondent.

SUPPLEMENTAL PETITION

On October 6, 1986, this Court granted a Petition for Writ of Certiorari in the case styled *Burlington Northern Railroad Company v. BMWE,* No. 86-39. The issues presented by this appeal are identical to the Burlington Northern litigation as they arise out of the same nationwide labor activity that resulted in the Burlington Northern case.

We bring this matter to the attention of this Court for its consideration of the Petition for Appeal filed by Richmond, Fredericksburg & Potomac Railroad Company.

Respectfully submitted,

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NO. 86-503 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Date: November 26, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-503

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit

BRIEF OF RESPONDENT BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

On September 26, 1986, petitioner Richmond, Fredericksburg & Potomac Railroad Company [hereinafter, "RF&P"] filed a petition with this Court for a writ of certiorari asking this Court to review the decision by the United States Court of Appeals for the Fourth Circuit in *RF&P v. BMWE,* 795 F.2d 1161 (4th Cir. 1986). Respondent Brotherhood of Maintenance of Way Employes

[hereinafter, "BMWE"] waived its right to respond to that petition on October 9, 1986, in view of this Court's decision in *Burlington Northern R.R. v. BMWE,* Sup. Ct. No. 86-39, on October 6, 1986, to review a comparable decision by the Seventh Circuit. However, on October 24, 1986, this Court requested that respondent file a response to the RF&P's petition. This response is respectfully submitted pursuant to that request.

COUNTERSTATEMENT OF THE CASE [1]

While respondent BMWE does not agree fully with petitioner RF&P's Statement Of The Case, including, in particular, petitioner's recitation of facts which are neither in the record of this case nor subject to judicial notice (*e.g.,* "Post-Decision Picketing," Pet. at 7-8), respondent submits that petitioner's statement at pages 3 through and including page 7 to "Post-Decision Picketing," and at pages 9 and 10 at part C, except as noted below, adequately sets forth the factual circumstances of this case. Respondent, therefore, has not submitted a separate Statement Of The Case, except as necessary to correct several inaccuracies on matters which respondent considers to be relevant.

Petitioner RF&P asserts that the district court in this case "explicitly found that RF&P was a 'neutral' in the primary labor dispute" and that the lower court "specifically found that the picketing of the RF&P by BMWE would have no effect on the parties engaged in the primary labor dispute . . . ." Pet. at 4-5 (footnote

[1] Petitioner RF&P states that Section 20 of the Clayton Anti-Trust Act is relevant to this petition, but then directs this Court's attention to Section 6 of that Act, 15 U.S.C. § 17, which it reproduced in Appendix D to its brief at p. 26a. Respondent BMWE agrees that Section 20 of the Clayton Act is relevant, but that section is included in the United States Code at 29 U.S.C. § 52. Petitioner BMWE has attached as Appendix A to this Response a copy of that statutory provision.

omitted). Respondent BMWE respectfully submits that those assertions misconstrue the record in this case.

In early April 1986, petitioner twice asked the district court to enjoin temporarily picketing which was occurring, first at one yard at the north end of its line (*i.e.*, the Potomac Yard) and then at a yard on the southern end of its line (*i.e.*, Acca Yard). On both occasions, the parties presented their cases to the court on affidavits and oral argument; no live testimony was taken, and the parties did not engage in any discovery. Indeed, respondent BMWE presented only one affidavit in this case, and that was on April 4, 1986. However, in its affidavit in opposition to petitioner RF&P's April 4, 1986 application for a Temporary Restraining Order and motion for a Preliminary Injunction, respondent BMWE explained why the Organization had decided to picket the RF&P's north end facility at Potomac Yard in Alexandria, Virginia. As respondent explained (Joint Appendix in 4th Cir. No. 86-3544 at 14):

> The D&H [Delaware & Hudson Railway, a railroad affiliated with the carriers against whom the BMWE was on strike] operates into plaintiff [RF&P's] . . . yard in Alexandria, Virginia (*i.e.*, the Potomac Yard), and obtains substantial traffic by interchange with other railroads in that yard. The BMWE has determined that it is important to the effectiveness of its strike against [the primary carriers] . . . to ask D&H employees and other rail employees in the RF&P's Potomac Yard to withdraw their services from their employers in order to prevent the movement of rail cars to or from the Guilford Rail System [the corporate rail system to which the D&H and the primary disputants belonged]. This action is necessary to place sufficient economic pressure upon the Guilford Rail System to

> convince them that it is in their economic interests to have the [primary carriers] . . . resume negotiations with the BMWE in order to resolve the disputes with this labor organization over rates of pay, rules and working conditions for employees which the BMWE represents on the [primary carriers] . . . .

Respondent BMWE did not, either at the first hearing on April 4, 1986, or at the hearing on the second request for a preliminary injunction on April 10, 1986, challenge petitioner's assertion that it was a neutral in the underlying dispute. Respondent, however, did maintain that petitioner's actions in interchanging cars with the D&H,[2] a corporation affiliated with the primary disputants, explained why the union was picketing first the Potomac Yard, and then Acca Yard in Richmond after the success of respondent BMWE's picketing was nullified by petitioner's use of supervisors to operate the Potomac Yard. *See,* Transcript of April 10, 1986 at 9-11. In denying petitioner RF&P's requests for injunctive relief, the district court assumed that the RF&P was a neutral in the underlying dispute; it did not, however make a finding of fact on that issue.

Petitioner's assertion that the district court found that the picketing would have no economic effect on the union is inaccurate. Here, the district court stated with respect to its denial on April 10, 1986, of a preliminary injunction to prohibit picketing of the Acca Yard in Richmond that "there is no showing that such picketing will result in any economic impact on" respondent BMWE. Pet. at 24a. Such a statement, however, does not equal a finding that picketing of both RF&P yards (*i.e.,* Potomac Yard and

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[2] The extent of the interchange was shown by petitioner's proffer on April 10, 1986, that between April 2 and April 10, approximately 450 cars accumulated in Potomac Yard for interchange with the D&H. Transcript of April 10, 1986 at 13.

Acca Yard) would have no effect on the parties engaged in the primary labor dispute. Rather, it simply reflects the fact that respondent BMWE did not seek to present any evidence to justify its reasons for picketing Acca Yard, because the wisdom or reasonableness of the union's actions was irrelevant to the jurisdictional issue raised by petitioner RF&P's request for injunctive relief. Respondent BMWE respectfully submits that it is inaccurate to change the court's negative statement into a positive finding of fact.[3]

RESPONSE TO REASONS FOR GRANTING THE WRIT

Respondent BMWE Respectfully Submits That This Court Should Defer Ruling On This Petition For A Writ Of Certiorari Until After It Decides No. 86-39, *Burlington Northern R.R. v. BMWE*

Respondent BMWE agrees with petitioner RF&P that the issues raised by this petition are important and should be decided by this Court. However, respondent respectfully submits that in view of the writ of certiorari which was issued on October 6, 1986 in No. 86-39,

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[3] Petitioner RF&P also states that the recommendations of Emergency Board No. 209 "have not been adopted by" the parties to the underlying labor dispute. Pet. at 8. That statement was literally correct on September 26, 1986, but misleading because respondent BMWE had accepted the Board's recommendations shortly after they were issued on June 20, 1986. *See,* Report of Congressional Advisory Board created by Pub. L. No. 99-385, at 7-8 (September 8, 1986). Moreover, that statement is no longer correct, for on September 30, 1986, Public Law No. 99-431 was signed into law requiring the parties to the underlying dispute to adopt the Emergency Board's recommendations, and on October 30, 1986, an arbitration panel established in accordance with that Act issued its award adopting those recommendations. It should be noted that the railroads involved in the underlying labor dispute are challenging the validity of both Public Law No. 99-431 (*i.e., Maine Central R.R. v. BMWE,* D.Me. Civil Action No. 86-0311-P) and the award (*i.e., Maine Central R.R. v. BMWE,* D.Me. Civil Action No. 86-0366-P).

Burlington Northern R.R. v. BMWE, there is no need, at this time, for this Court to grant the writ requested by petitioner RF&P. As petitioner noted in its Supplemental Brief to this Court, the issues raised by the petition in this case are currently before this Court in No. 86-39; those issues are being briefed on a schedule which will permit oral argument in February 1987.[4] To grant the writ in this case at this time will either cause an unnecessary delay in the resolution of No. 86-39 while the two cases are consolidated and the RF&P prepares its brief, or, if the cases are not consolidated, will entail needless duplicative efforts on the part of the parties and this Court while the same issues being raised in No. 86-39 are briefed and argued in the *RF&P* case.

Respondent BMWE respectfully submits that there is no need to go through such futile exercises, since the facts and the issues raised in the *RF&P* case are comparable to those presented by the *Burlington Northern* case. The *Burlington Northern* case involves threatened picketing of a road which, like the RF&P, connects with the D&H, but also involves threatened, and in one case, actual picketing of other roads which have no physical connection with the primary disputants or with any of their corporate affiliates. In view of the fact that the *Burlington Northern* case presents all of the issues raised by the *RF&P* case, but does so in a more complete factual setting, BMWE suggests that this Court defer ruling on the RF&P's petition for a writ of certiorari and hold that petition in abeyance until it decides No. 86-39, *Burlington Northern R.R. v. BMWE.*

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[4] Petitioners' brief on the merits in No. 86-39 was filed on November 20, 1986.

CONCLUSION

Respondent BMWE respectfully submits that this Court should defer ruling on the pending petition for a writ of certiorari in this case until after it issues its decision in No. 86-39, *Burlington Northern R.R. v. BMWE.*

Respectfully submitted,

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Date: November 26, 1986

APPENDIX A

Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from pain or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value or from peaceably assembling in a lawful manner, or for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.